

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

**FOR THE DEPARTMENT OF VETERANS AFFAIRS**

William A. Rauch,

Petitioner,

vs.

City of Ely,

Respondent.

**FINDINGS OF FACT,  
CONCLUSIONS, AND  
RECOMMENDATIONS**

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick at 8:30 a.m. on June 29, 2001, in the Ely City Council Chambers, 209 East Chapman Street, Ely, Minnesota.

The Petitioner, William A. Rauch, 1971 West Shagawa Road, Ely, Minnesota 55731, appeared on his own behalf. Patricia Y. Beety, Attorney at Law, 145 University Avenue W., Saint Paul, Minnesota 55103-2044, appeared on behalf of the Respondent, City of Ely (hereinafter "Respondent" or "the City"). The record of the proceeding closed on June 29, 2001, upon conclusion of the hearing.

**NOTICE**

This Report is a recommendation and not a final decision. After a review of the record, the Commissioner of the Minnesota Department of Veterans Affairs will make the final decision, in which he may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61 the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Clinton Bucher, Department of Veterans Affairs, Veterans Service Building, 20 West 12th Street, Saint Paul, Minnesota 55155-2079 (tel. 651-296-2562), to ascertain the procedure for filing exceptions or presenting argument.

## STATEMENT OF ISSUES

The issues to be determined in this proceeding are whether Mr. Rauch was denied veterans preference points in the hiring process used by the City to fill a full-time Utility Person position and whether any other violation of the Veterans Preference Act occurred in the hiring process.

Based upon all of the files, records, and proceedings herein, the Administrative Law Judge makes the following:

## FINDINGS OF FACT

1. Mr. Rauch served in the United States Army on active duty from November 14, 1966, until September 2, 1968.<sup>[1]</sup> He received an honorable discharge from the Army.

2. Paul Ness is a human resources consultant regularly used by the City. He received a job description for the Utility Person position from the City.<sup>[2]</sup> Mr. Ness developed the training and experience rating scale for that position, based on the contents of the position description. The minimum training and experience portion was scored at 50 points and was afforded to all applicants since the position was entry-level.<sup>[3]</sup> The 50-point level was considered the passing score. The additional training and experience portion afforded up to 8 points for previous experience in meter reading, up to 10 points for specific experience in utility billing, up to 6 points for accounting experience, up to 8 points for customer contact experience, and 8 points for currently holding a Class B commercial driver's license. The Veteran's Preference portion of the scale afforded 5 points for being a "covered applicant" or 10 points for a disabled veteran.<sup>[4]</sup> The total number of points available to a nonveteran is 90, to a nondisabled veteran is 95, and to a disabled veteran is 100.

3. Mr. Rauch submitted an application for employment on January 1, 2001 in response to the City's posting of the Utility Person position. Mr. Rauch completed and attached a form for requesting Veterans Preference points. Mr. Ness scored his application. Mr. Rauch was awarded 50 points for minimum training and experience, 6 points for accounting experience, 8 points for customer contact experience, and 8 points for holding a Class B commercial driver's license. Mr. Rauch was awarded 5 points for veteran's preference. Mr. Rauch's "Grand Point Total" came to 77.<sup>[5]</sup> The score sheet was marked "Pass."<sup>[6]</sup>

4. Sixty-six persons applied for the Utility Person position.<sup>[7]</sup> Veterans preference points were afforded to each applicant who requested the preference and provided proper documentation of eligibility. The veterans preference points were added to each qualifying applicant's score. After receiving the results, Mr. Ness examined the scores to select a cut score that would result in a manageable number of interviewees.<sup>[8]</sup> Applying a cut score of 65 would result in an interview pool of eight

applicants. Eighteen applicants received a score of 64 points or higher. There were no applicants receiving veterans preference among those who scored 64 on the application. The cut score for interviews was set at 65. The eight applicants who scored more than 65, including Mr. Rauch, were certified and they were invited to interview for the position.<sup>[9]</sup>

5. Interviews for the position were conducted by Terry Jackson, General Manager of the Ely Utilities Commission; Commissioner Dick Pucel; and Commissioner Rob Wilmunen. After interviewing all eight certified applicants, the interviewers chose Daniel Armstrong, a nonveteran, for the position. They did so because they considered him, based upon the applications and interviews, to be the best qualified for the job.

6. On February 16, 2001, Mr. Jackson wrote to Mr. Rauch, simply informing him that he had not been selected for the Utility Person position.<sup>[10]</sup> Later that day, after some questions by Mr. Rauch, Mr. Jackson provided another letter to Mr. Rauch. The second letter stated that the person selected was considered to be the best candidate for this job.<sup>[11]</sup> On February 20, 2001, the Ely City Council approved the hiring of the candidate selected by the Ely Utilities Commission.<sup>[12]</sup>

7. Mr. Rauch made inquiries into the hiring process, including the identity of the members of the Ely Utilities Commission and veteran's status of the interviewers.<sup>[13]</sup>

8. The City is a political subdivision of the State of Minnesota, governed by an elected City Council that has the power to hire, fire, and lay off employees of the City. The Utility Person position is within the structure of the Ely Utilities Commission. The Ely Utilities Commission operates under the authority of the City. The occupant of the Utility Person position is an employee of the City for the purposes of the Veterans Preference Act.

9. On April 9, 2001, Mr. Rauch filed a Petition for Relief with the Department of Veterans Affairs. A Notice of Hearing was served on the City on May 4, 2001, setting this matter on for contested case hearing.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

## **CONCLUSIONS**

1. Under Minn. Stat. § 14.50 and § 197.481, the Administrative Law Judge and the Commissioner of Veterans Affairs have authority to consider the issues raised under the Veterans Preference Act, Minn. Stat. § 197.46, in this proceeding.

2. The Notice of Petition and Order for Hearing was proper in all respects, and the Department of Veterans Affairs has complied with all relevant, substantive and procedural requirements of statute and rule.

3. The City received timely and proper notice of the hearing herein.

4. Mr. Rauch is an honorably discharged veteran within the meaning of Minn. Stat. §§ 197.447 and 197.46 and is entitled to all of the protections and benefits afforded by the Veterans Preference Act, Minn. Stat. §§ 197.46, *et seq.*

5. The City is a political subdivision of the state within the meaning of Minn. Stat. § 197.46, and its personnel practices are therefore subject to the provisions of the Minnesota Veterans Preference Act, Minn. Stat. §§ 197.46, *et seq.*

6. The hiring process followed by the City complies with the requirement under Minn. Stat. §§ 43A.11 and 197.455 that veterans be afforded five points and disabled veterans be afforded ten points in competitive hiring examinations.

7. The City provided Mr. Rauch with the reason that he was not selected as required by Minn. Stat. § 43A.11, subd. 9. He was notified that the candidate selected was considered the best candidate. That was an appropriate reason.

8. Mr. Rauch was not denied any Veterans Preference rights through the hiring process used by the City.

9. These Conclusions are made for the reasons set out in the Memorandum, which is attached to and incorporated by reference in these Conclusions.

10. Any Conclusion more properly termed a Finding is hereby adopted as such.

Based upon the foregoing Conclusions, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

IT IS RESPECTFULLY RECOMMENDED that the Petition of William A. Rauch be DISMISSED.

Dated this 17<sup>th</sup> day of July 2001.

S/ Steve M. Mihalchick  
STEVE M. MIHALCHICK  
Administrative Law Judge

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Reported: Tape Recorded (two tapes); No Transcript Prepared.

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**NOTICE**

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

**MEMORANDUM**

Mr. Rauch advances two distinct theories as to how his veterans preference rights were violated by the hiring process used by the City. Mr. Rauch maintains that the point scale used by the City was improper. He also asserts that some subjective bias against veterans was present in the process.

The City maintains that it conducted a hiring process that meets the requirements of the Veterans Preference Act and relevant cases. The use of a point scale as a requirement for scoring all types of open, competitive examinations was first set out in **Hall v. City of Champlin**, 463 N.W.2d 502 (Minn. 1990). Under **Hall**, public employers must adjust their hiring to a 100-point system and add five points to the veteran's score (ten, if the veteran is disabled).

There has been little development of the law since **Hall** was decided in 1990. One case, **McAfee v. Department of Revenue**, 514 N.W.2d 301 (Minn. App. 1994), **review denied** (Minn. Apr. 19, 1994), holds that a veteran who is included in the final interview phase of the process has received all the preference to which the veteran is entitled.<sup>[14]</sup> In a recent unpublished case, the Minnesota Court of Appeals assessed the preference to be afforded veterans in hiring as follows:

The Minnesota Veterans Preference Act does not create an absolute preference for veterans, rather the veteran's preference credit simply increases the chance that a veteran will receive an interview. **McAfee v. Department of Revenue**, 514 N.W.2d 301, 305 (Minn. App. 1994), **review denied** (Minn. Apr. 19, 1994). Although appellants were honorably discharged veterans, the county was not required to hire them. "[T]he [hiring] authority may hire any certified applicant." **Id.** Here, once appellants were given their veteran's preference points, they were "afforded all of the preference entitled to [them] by law." **Grehl**, 484 N.W.2d at 817. The record shows that appellants were awarded their veteran's preference points and received interviews based on their

application scores. With the veteran preference points in place, the county was free to hire any of the six certified finalists as it saw fit.<sup>[15]</sup>

In **Gary Lee Anderson v. Independent School District No. 146**, OAH Docket No. 8-3100-9129-2 (Recommendation issued November 14, 1994), the structure of the point system used by a political subdivision in hiring was discussed. In that matter, Administrative Law Judge Jon Lunde analyzed the situation as follows:

There are some unusual aspects to Respondent's scoring of the applications. The highest possible score from any individual scorer is 80, not 100. The only candidate who could have obtained a score of 80 was a disabled veteran. The highest score available to a nonveteran was 70. A "passing" score was 40 out of 80, rather than the usual 75 out of 100.

The applicants' scores were tallied by two scorers, which doubled the passing score. Each scorer added five points to Petitioner's score. Thus, ten points were added to the Petitioner's total score. To convert a 80-point scoring system to a 100-point system, or a 160-point system to a 200-point system, one must increase the 80- or 160-point systems upward by a factor 1.25.

Under Respondent's scoring system Petitioner received a veteran's preference of 6.25 points on a 100-point scale, not five points ( $5 \times 1.25$ ). This is more points than a veteran is entitled to receive in a "normal" 100-point scoring system. Also, in "normal" systems, a 100-point score can be obtained by nonveterans, but Respondent's system prevents nonveterans from obtaining the maximum score.<sup>[16]</sup>

While ALJ Lunde characterized the point system as having "unusual aspects," there was no violation of the Veterans Preference Act found, since the veteran received more preference than required, not less.<sup>[17]</sup> In this matter, the maximum score of 100 points can only be obtained by a disabled veteran. A nondisabled veteran cannot score higher than 95. A nonveteran cannot score higher than 90 on the City's examination. In effect, preference afforded to a nondisabled veteran is 5.55 points on a 100-point scale.<sup>[18]</sup> For a disabled veteran, the preference is 11.11 points under the City's system. In this matter, Mr. Rauch received 5.55 points as veterans preference and no case has held that receiving more than the specified preference causes harm to the veteran.<sup>[19]</sup>

Mr. Rauch maintains that setting the passing score at 50 is somehow improper. The holding in **Anderson** also addresses this argument. In **Anderson**, the passing score was 40 out of 80. This is the mathematical equivalent to 50 out of 100. Affording each candidate 50 points merely reflects the City's perception that the job is an entry-level position that requires no special experience or training as a minimum requirement. There is no violation of the Veterans Preference Act in the point structure of the open, competitive examination.

Before damages can be awarded under the Veterans Preference Act, the veteran must show that the violation caused the veteran harm. In this matter, Mr. Rauch was granted the appropriate number of veterans preference points and he was afforded an interview. As discussed above, the consistent holdings regarding application of veterans preference points indicates that there is no preference that applies in the interview. Mr. Rauch received all that he is entitled to under the Veterans Preference Act.

Mr. Rauch contended that some bias against veterans motivated the hiring of a nonveteran into the Utility Person position. There is no evidence of such animus in the record of this matter. The Administrative Law Judge allowed for examination of the interviewers to determine if some improper motive existed. It was clear from that evidence that they all made a good faith judgment as to whom the best candidate for the job would be. Mr. Rauch has not demonstrated that the City engaged in any conduct that would constitute a violation of the Veterans Preference Act.

The hiring process used by the District does not violate the Veterans Preference Act. Mr. Rauch received the points he was entitled to and he interviewed for the position. He was told the panel considered someone else the best candidate. Mr. Rauch demonstrated no problems with the hiring process. Therefore, the Administrative Law Judge recommends that the veteran's petition be DISMISSED.

S.M.M.

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<sup>[1]</sup> Exhibit R-3.

<sup>[2]</sup> Exhibit R-1.

<sup>[3]</sup> Ness Testimony, Tape 1; Exhibit R-2.

<sup>[4]</sup> Exhibit R-2. In both instances, the veteran must request the preference for it to be added to the applicant's total score.

<sup>[5]</sup> Exhibit R-4.

<sup>[6]</sup> *Id.*

<sup>[7]</sup> Exhibit R-5.

<sup>[8]</sup> Wilmunen Testimony, Tape 2.

<sup>[9]</sup> Exhibit R-6.

<sup>[10]</sup> Exhibit P-7.

<sup>[11]</sup> Exhibit R-8.

<sup>[12]</sup> Exhibit P-4.

<sup>[13]</sup> Exhibit P-2.

<sup>[14]</sup> **McAfee v. Department of Revenue**, 514 N.W.2d at 305.

<sup>[15]</sup> **Richard J. Utsch, et al., v. Big Stone County**, C4-96-2428(Minn.App. August 26, 1997).

<sup>[16]</sup> **Gary Lee Anderson v. Independent School District No. 146**, OAH Docket No. 8-3100-9129-2 (Recommendation issued November 14, 1994).

<sup>[17]</sup> *Id.*

<sup>[18]</sup> The mathematical calculation is  $(5/90) * 100 = 5.55$ .

<sup>[19]</sup> In dicta, the Court of Appeals in **Utsch, v. Big Stone County**, *supra*, mentioned the hiring system for a separate position where nonveterans could not score more than 95 and veterans were awarded five points on a 100-point scale. There was no mention of disabled veterans. The Court of Appeals made no suggestion that the hiring scale was faulty.